

And We Even Teach

CARL B. RUBIN*

You know what is the toughest task for a trial judge? It is teaching. You know what is the most satisfying task for a trial judge? It is teaching. With some frequency, I am called upon to instruct a small group of people in principles of law. They are collectively known as juries. Instructing them is different. When you entered law school, you already had an undergraduate degree. When you attended the classes on torts, you spent one semester of anywhere from three to five hours per week learning the principles that apply to torts.

When I instruct jurors, I know that they will have, on the average, a high school education and perhaps one year of college. I do not have a full semester to instruct them on the intricacies of torts; I have perhaps twenty or thirty minutes. For example, you may have spent several sessions on the concept of "proximate cause." When I instruct a jury, the individual jurors may never have heard of proximate cause, and I am confronted, in most instances, with a legalistic definition that they may not understand. This is one of the inherent problems: lawyers and judges speak a unique language. We understand each other and we understand that many of the terms we use are in fact shorthand. A juror does not speak the language and is unacquainted with the concepts that lie behind the shorthand.

This task is not overwhelming and indeed, in my opinion, it is the single most important thing that a trial judge must do. A confused jury is the equivalent of a loose cannon: there is no telling what a confused jury may do, and their actions may or may not be correctable. A properly instructed jury is the goal. It does not matter then how that jury decides. If they understand the problems with which they are confronted, their decision in almost all instances is supportable.

When this basic problem occurred to me many years ago, I attempted to establish a procedure that would minimize jury confusion. The basis of the system is a collection of a thousand jury instructions with a consistent and identifiable numbering system. Instructions are available to counsel for inspection in advance of trial. I believe jury instructions should be in writing. After they are read at the conclusion of final argument, they should be sent to the jury room with an index. This will enable all jurors to read them and in the event of a disagreement as to what I said, determine the specific instruction in question.

* Judge, United States District Court, Southern District of Ohio; A.B., University of Cincinnati, 1942; J.D., University of Cincinnati College of Law, 1944; Honorary Doctorate of Law, University of Cincinnati College of Law, 1988.

If I might digress, I would like to point out that I am currently experimenting with the use of computer monitors to display the instructions as they are read. My courtroom in Cincinnati is equipped with ten computer monitors through which we may display any written document. I believe that presenting instructions to two of the senses, both sight and hearing, will enhance the understanding of the viewer. One example is the term "proximate." Most jurors are unfamiliar with that term and if they only hear it, they may well confuse it with "approximate." An approximate cause is a totally different concept than a proximate cause. I have, on occasion, given each juror a copy of the instructions in order that the juror may follow while the instructions are being read.

Instructions in writing can always be available to attorneys. They are now also obtainable on computer disks. An attorney need only present a blank disk, and that attorney will have available all of my instructions with no charge and with the elapse of very little time. I believe that most law firms in Cincinnati have my instructions, and this results in a great deal of saved time. If there are trial instructions that a lawyer wishes me to give, he need only refer to them by number. I welcome suggested instructions from either side so long as there is authority cited. It really makes no sense to cite me my own boilerplate or to quote instructions that I have given in the past. All counsel need do is refer to that instruction by number and I will consider it. I make every effort to have my tentative instructions available for distribution by the end of the plaintiff's case. If the plaintiff elects to dismiss certain causes of action, or if I sustain a motion for directed verdict, jury instructions on those causes are irrelevant.

My instructions also contain annotations. I have always had the concern that an appellate panel may say, "Where in the world did he get that concept of law?" If I have a citation to a court of appeals or the Supreme Court of the United States, the question is answered. I try not to cite decisions of the court of appeals of another circuit, although on occasion in the absence of any Sixth Circuit law available, I have done so. I will utilize decisions of the Ohio Supreme Court or Ohio appellate courts in diversity cases. I will not rely on courts of another state unless that law is involved.

The ultimate question, of course, is, "Have these efforts proved successful?" If a statistical basis would bear upon that question, I would point out that in twenty-three years as a federal judge, I have probably presided at over 500 jury trials. I have never kept an exact count, but I know that I have set aside fewer than five verdicts in that time, and I have set aside verdicts or granted remittiturs in less than ten cases in that time. The proof of the pudding, it is said, is in the eating.